No. 05-128

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IN THE

Supreme Court of the United States

HOWARD DELIVERY SERVICE, INC., *et al.*,
Petitioners,

v.

ZURICH AMERICAN INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT ZURICH AMERICAN INSURANCE COMPANY

MARGARET M. ANDERSON
HUGH S. BALSAM
LORD BISSELL BROOK LLP
111 South Wacker Drive
Chicago, IL 60606
(312) 443-0402

KAREN LEE TURNER
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1515 Market Street, Ninth Floor
Philadelphia, PA 19102
(215) 851-8431

RICHARD W. HARDY
ZURICH AMERICAN INSURANCE COMPANY
3910 Keswick Road
Baltimore, MD 21211
(410) 338-9190

DONALD B. VERRILLI, Jr.
Counsel of Record
WILLIAM M. HOHENGARTEN
ELAINE J. GOLDENBERG
CAROLINE LEWIS WOLVERTON
ELIZABETH G. PORTER
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

BARBARA S. STEINER
DANIEL R. MURRAY
WILLIAM L. SCOGLAND
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Counsel for Respondent

QUESTION PRESENTED

Whether payments due from a debtor under insurance policies that provide workers' compensation benefits to the debtor's employees who are injured on the job during the 180 days before the debtor's bankruptcy are debts for "contributions to an employee benefit plan arising from services rendered within 180 days before the date of the filing of the [bankruptcy] petition" under 11 U.S.C. § 507(a)(4)?

RULE 29.6 STATEMENT

The respondent is Zurich American Insurance Company. Its parent corporations are Zurich Holding Company of America, Inc., Zurich Insurance Company, Crown Management Services Limited, Zurich Group Holding, Zurich Financial Services, and Allied Zurich plc.

No publicly held company owns 10% or more of respondent's stock.

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Workers' compensation provides health, disability, and death benefits that are vitally important to millions of workers and their families, especially those employed in dangerous occupations. Indeed, workers' compensation benefits are so important to employee welfare that the vast majority of States require employers not only to provide these benefits to their employees, but also to guarantee payment of the benefits through insurance or similar means. Had States not long ago made these benefits mandatory, workers' compensation would surely be a common feature of bargained-for employee benefit packages today.

Petitioners nevertheless contend that employer contributions owed to workers' compensation benefit plans should be excluded from the priority for "contributions to employee benefit plans" under § 507(a)(4) of the Bankruptcy Code, precisely because States require employers to provide these benefits.[1] Nothing in the text, legislative history, or purpose of the statute supports that counterintuitive result. The plain text of § 507(a)(4) encompasses all employee benefit plans – including those through which employers provide workers' compensation – irrespective of whether States mandate the benefits or whether they are "bargained-for wage substitutes."

Petitioners' "bargained-for wage substitute" test is an arbitrary extratextual restriction on the scope of § 507(a)(4) that cannot be justified on any ground and that perversely denies statutory protection to the very forms of employee benefits States have deemed most important. In contrast,

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[1] Unless otherwise noted, citations to the Bankruptcy Code in this brief are to the Code before its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 215 ("2005 Act"). The 2005 Act does not apply here because Howard entered bankruptcy before the Act's effective date. *See id.* § 1501. The provision the parties refer to as § 507(a)(4) is now renumbered, with changes that are not relevant here, as § 507(a)(5) (as amended 2005).

enforcing § 507(a)(4) according to its terms directly advances the core purpose for which Congress enacted that provision – protecting the financial integrity of employee benefit plans.

STATEMENT

A. Factual Background

Before its bankruptcy, petitioner Howard Delivery Service, Inc. ("Howard") operated a freight trucking business with terminals in Illinois, Michigan, Ohio, and West Virginia, and operations in surrounding States.[2] In the 1990s, Howard had as many as 480 employees, most unionized.

Howard obtained insurance under two policies from respondent Zurich American Insurance Company ("Zurich") to provide workers' compensation benefits to Howard's employees in 10 States.[3] The insurance did not cover Howard's workers in West Virginia or Ohio because those are (or were) "monopolistic" States that do not permit private workers' compensation insurance. *See* Ohio Rev. Code Ann. §§ 4123.30-4123.35; W. Va. Code § 23-3-1; *infra* at 8-9.[4]

Under the policies, Howard was liable to Zurich for two kinds of payments: (1) the initial premiums specified in the policies, and (2) retrospective "loss sensitive" adjustments to

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[2] Background facts concerning Howard are taken from the First Amended Disclosure Statement for Chapter 11 Plan of Reorganization of Official Committee of Unsecured Creditors (Dkt. #297, filed Dec. 23, 2002) ("Disclosure Statement"). Docket number references are to the bankruptcy docket for *In re Howard Delivery Service, Inc.*, Case No. 02-30289 (Bankr. N.D. W. Va.).

[3] The 10 States are Iowa, Illinois, Indiana, Kentucky, Maryland, Michigan, New York, Pennsylvania, Virginia, and Wisconsin.

[4] The Fourth Circuit mistakenly assumed that the Zurich policies covered Howard's West Virginia employees. Pet. App. 3a. Howard's brief reflects the same misconception. *E.g.*, Pet'rs Br. 14, 18, 32, 50.

the premiums, up or down, based on Howard's actual loss experience ("retrospective rating"). Howard thereby retained much of the risk of workers' compensation costs.[5]

In accordance with legal requirements for workers' compensation insurance, each policy provides that while Zurich may cancel the policy for non-payment subject to certain restrictions, Zurich will continue to pay workers' compensation benefits arising from on-the-job accidents that occur while the policy is in effect, even if Howard defaults on its payment obligations to Zurich. *See, e.g.*, N.Y. Workers' Comp. Law § 54(3). These benefit can extend decades into the future. *See infra* at 8. Thus, like a pension trust fund, workers' compensation insurance serves to secure the payment of benefits to employees long after an employer might have gone out of business. *Id.*

In 2001, Howard lost its major customer and could no longer operate profitably. Rather than shut down immediately, Howard attempted to maximize the value of its assets for creditors and minimize disruption to its work force through an orderly wind-down of its business outside of bankruptcy. Because of its financial difficulties, Howard stopped paying amounts due to Zurich under the workers' compensation policies approximately six months prior to filing for bankruptcy. Zurich could have responded by canceling the policies so that it would not have to pay benefits to workers who were injured after cancellation.[6] But cancellation would have forced Howard out of business because it operates in jurisdictions that require employers to carry workers' compensation insurance (or meet stringent

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[5] In some cases, Howard's "loss sensitive" responsibility was slightly different: Howard was liable for a deductible up to $250,000 per claim.

[6] Zurich would have had to give advance notice to state regulators and to Howard before cancellation. *E.g.*, 820 Ill. Comp. Stat. 305/4(b) (10 days' notice); Va. Code Ann. § 65.2-804(B) (30 days' notice).

self-insurance requirements that a financially insecure company cannot satisfy). *See infra* at 8-10. Zurich forbore cancellation for several months despite Howard's impending insolvency. Finally, on January 30, 2002, Howard sought bankruptcy protection by filing a voluntary Chapter 11 petition.

B. Proceedings Below

Howard is presently being liquidated under a Chapter 11 plan confirmed by the bankruptcy court. As the estate's assets are concededly insufficient to pay all unsecured claims entitled to priority under 11 U.S.C. § 507, no distribution of proceeds will be made for non-priority unsecured claims. *See infra* note 9.

Zurich filed a proof of claim in Howard's bankruptcy seeking all amounts Howard owes under the policies for Zurich's undertaking to pay workers' compensation benefits to Howard's employees injured on the job during the 180 days immediately prior to bankruptcy. Zurich invoked 11 U.S.C. § 507(a)(4), which provides a priority for unpaid contributions to employee benefit plans arising from services rendered within 180 days of a bankruptcy filing. *See* J.A. 32a.[7] As required by the Bankruptcy Code, Zurich liquidated its priority claim by ascertaining the amount Howard owes, after taking into account retrospective loss-sensitive adjustments, for Zurich's provision of workers' compensation benefits to Howard's employees who, during

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[7] Initially, Zurich claimed administrative expense priority for this claim under 11 U.S.C. § 507(a)(1), but subsequently amended the proof of claim to assert the correct priority under § 507(a)(4). J.A. 32a. Zurich also filed a second proof of claim, which is not at issue here, for amounts due from Howard for benefits to employees injured more than 180 days before its bankruptcy.

the 180-day period, were injured on the job. *See* J.A. 33a-36a.[8]

Howard objected on the ground that Zurich is not entitled to priority under § 507(a)(4). The bankruptcy court agreed, holding that § 507(a)(4) applies only to "bargained-for, wage-substitution-type benefits" and that workers' compensation is not bargained-for. Pet. App. 57a. The district court affirmed. Pet. App. 39a.

On further appeal, the Fourth Circuit reversed. Judge King found that the plain language of § 507(a)(4) covers the payments due from Howard to Zurich. Pet. App. 8a. Reaching the same result, Judge Shedd concluded that "employee benefit plan" might be ambiguous, but that the legislative history indicates that Congress intended this phrase to have the same meaning in § 507(a)(4) as it does in the Employee Retirement Income Security Act ("ERISA"), where it indisputably covers workers' compensation insurance. Pet. App. 23a. Judge Niemeyer dissented, reasoning that the priority applies only to a "wage surrogate." Pet. App. 36a.[9]

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[8] Zurich's claims were reduced to reflect amounts it received under a letter of credit Howard had posted as partial security. That security did not satisfy the debt, however. *See* J.A. 15a-17a.

[9] Before deciding the case, the Fourth Circuit directed the parties to address whether the lower court decisions were final and appealable. Zurich and Howard agreed that the decisions were final: because the estate cannot pay any non-priority claims (*see* Disclosure Statement, at 22), denial of priority is tantamount to denial of Zurich's claim. Zurich also filed a Rule 28(j) letter stipulating that it would withdraw its claim if the priority ruling were affirmed. These considerations satisfied the Fourth Circuit. *See* Pet. App. 7a n.6.

C. The Legal Framework for Workers' Compensation and Other Employee Benefits

Because the statutory construction issue in this case ultimately depends on whether workers' compensation insurance should be considered an employee benefit plan for purposes of § 507(a)(4), it is important at the outset to have a clear understanding of exactly what workers' compensation is, how it is typically provided, and how it relates to other types of employee benefits and employee benefit plans.

1. Workers' Compensation Benefits

Rapid industrialization in the late nineteenth century led to an alarming increase in the number of employees injured at work, but common-law tort defenses often prevented the injured employees from recovering damages from their employers. *See* 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 2.03, at 2-3 to 2-6 (1999) (hereinafter "Larson"). Many workers disabled on the job were thus left unable to support themselves or their families. In response, "[i]n the early 20th century, States began to replace the common-law system, which often saddled employees with the difficulty and expense of establishing negligence or proving damages, with a compulsory insurance system requiring employers to compensate employees for work-related injuries without regard to fault." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 44 (1999); *see also* 1 Larson §§ 2.07-2.08, at 2-13 to 2-18 (2002 Supp.). Workers' compensation is thus a no-fault state law system for providing benefits to employees who suffer a disabling injury or disease in connection with their employment.[10]

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[10] Federal law also requires workers' compensation for certain workers under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") and its extensions. 33 U.S.C. § 901 *et seq.*; *see also, e.g.*, 42 U.S.C. § 1651 (private employees at U.S. defense bases abroad).

Benefits provided by workers' compensation. Workers' compensation laws require employers to provide three types of benefits to employees who are injured on the job: payment of medical expenses; payment of a portion of wages lost due to disability; and payment of a "death benefit" to the employee's survivors in the case of fatality. *E.g.*, 820 Ill. Comp. Stat. 305/7, 305/8(a)-(b); 33 U.S.C. §§ 902(2), 904, 907-909.[11] In contrast to social welfare programs, workers' compensation places the cost of these benefits on an injured worker's employer, rather than on the government, taxpayers, or society in general. 1 Larson § 1.04, at 1-14 (2002 Supp.); *see also, e.g.*, *Eversman v. Concrete Cutting & Breaking*, 614 N.W.2d 862, 864 (Mich. 2000) (workers' compensation "allocat[es] the burden of these payments to the employer"). This gives the employer an incentive to reduce the risk of employee injury by implementing appropriate health and safety measures. *See generally, e.g.*, Richard B. Victor, *Workers' Compensation and Workplace Safety* 1-47 (1982); Guido Calabresi, *The Cost of Accidents* 68-94 (1970).

Workers' compensation benefits are usually the exclusive remedy for work-related illness or injury, and a covered employee may not sue for damages. While exclusivity is a *quid pro quo* to employers for the employee's certain recovery upon injury, "the primary purpose of [workers' compensation laws] is to benefit the worker." *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 865 (Iowa 2003); *accord infra* note 17 (citing cases). For this reason, most States compel employers to provide workers' compensation

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[11] The U.S. Department of Labor provides an overview of variations among state workers' compensation laws. *See* U.S. Dep't of Labor, Table 1 (2005), *at* http://www.dol.gov/esa/regs/statutes/owcp/stwclaw/tables-pdf/table1.pdf; *see also* U.S. Chamber of Commerce, Statistics & Research Ctr., *Analysis of Workers' Compensation Laws* (2005).

benefits and secure their payment, rather than giving employers the choice whether to do so. *See infra* at 9-10.

The role of insurance. A critical feature of all workers' compensation laws is the employer's duty not only to pay benefits to injured employees, but also to secure the payment of these benefits. *E.g.*, N.Y. Workers' Comp. Code § 50; 33 U.S.C. §§ 904(a), 932(a). As with pensions, workers' compensation benefits may be payable for years or even decades, as when a worker is permanently disabled. *E.g.*, 820 Ill. Comp. Stat. 305/8(f); 33 U.S.C. § 908(a).

In most States, an employer can meet this obligation by obtaining insurance from a private insurer or by self-insuring (*i.e.*, assuming its own losses). *E.g.*, 820 Ill. Comp. Stat. 305/4; 33 U.S.C. § 932(a). Workers' compensation laws require a private insurance policy to provide benefits to employees whose injuries occur while the policy is in effect, even if the employer becomes insolvent and does not pay the premium or deductible. *E.g.*, N.Y. Workers' Comp. Law § 54(3); 33 U.S.C. § 936(a). These mandates secure the payment of benefits for employees, as opposed to managing risk for employers.

Private insurers are the sole source of workers' compensation insurance in 26 States and under the LHWCA. Nineteen other States also have state-administered workers' compensation funds that compete with private insurers in those States and serve the same function. *E.g.*, Ky. Rev. Stat. Ann. § 342.801(2); Ariz. Rev. Stat. § 23-981. Until recently, five States (North Dakota, Ohio, Washington, West Virginia, and Wyoming) had "monopolistic" state-administered funds and did not allow private insurance (although they permit self-insurance). *E.g.*, Ohio Rev. Code Ann. §§ 4123.30-4123.35. On January 1, 2006, West Virginia began a transition from its state fund – which was plagued by a $3 billion deficit – to a system relying on

private workers' compensation insurance. *See* W. Va. Code §§ 23-2C-1 to 23-2C-23.

"Self-insurance" is something of a misnomer, in that a self-insuring employer undertakes to pay benefits directly to employees, without insurance. An employer generally may self-insure only if it first establishes that it has the financial ability to pay workers' compensation benefits directly. *E.g.*, 820 Ill. Comp. Stat. 305/4(a)(1); 33 U.S.C. § 932(a)(2). Self-insurers usually must post a bond or other security as collateral and pay assessments to a guaranty fund. *E.g.*, Ky. Rev. Stat. Ann. § 342.906; 820 Ill. Comp. Stat. 305/4(a)(2); 33 U.S.C. § 932(a)(2). Financially insecure employers – such as Howard prior to bankruptcy – obviously cannot meet the stringent requirements for self-insurance, and many financially sound companies find the requirements too onerous to make self-insurance attractive.

Mandatory and elective workers' compensation systems. In nearly every jurisdiction, participation in the workers' compensation system is mandatory for most employers. *E.g.*, 820 Ill. Comp. Stat. 305/4; 33 U.S.C. § 932(a). An employer that fails to secure the payment of benefits operates unlawfully and is subject to serious penalties, often including criminal liability; it also forfeits its tort immunity and common law defenses to suit by injured employees. *E.g.*, 820 Ill. Comp. Stat. 305/4(d); 33 U.S.C. §§ 905(a), 938.

Even in these "mandatory" jurisdictions, however, workers' compensation is sometimes elective. Limited classes of employers are often exempted from mandatory coverage requirements, but such employers are nevertheless permitted to opt in. *E.g.*, Tenn. Code Ann. § 50-6-106(5) (excluding most employees of small businesses employing fewer than five individuals but permitting their employers to elect to cover them); Mich. Comp. L. § 418.118(2)

(excluding most domestic workers but permitting their employers to elect coverage).

Three States – New Jersey, Texas, and Wyoming – characterize workers' compensation as elective. N.J Stat. Ann. § 34:15-7; Tex. Labor Code Ann. § 406.002; Wyo. Stat. Ann. § 27-14-108 (mandating workers' compensation only for "extrahazardous" occupations). In New Jersey, however, features of the workers' compensation law tend to compel employers to participate, so that (in the words of the U.S. Department of Labor) "[t]echnically coverage is elective, but practically compulsory."[12]

Fall-back funds. Despite legal requirements that employers secure payment of benefits, in some cases neither the employer nor an insurer is available to pay benefits to injured workers. This can occur if the employer unlawfully operates without workers' compensation insurance; qualifies for self-insurance but becomes insolvent; or insures but the insurer becomes insolvent. Given the importance of workers' compensation, States generally have fall-back funds to pay benefits in these circumstances. Many States have uninsured employer funds to pay benefits to workers whose employers did not have insurance and have become insolvent, *e.g.*, 820 Ill. Comp. Stat. 305/4(a)(2), while all States have insurance guaranty funds to pay benefits underwritten by an insurer that has become insolvent, *e.g.*, 215 Ill. Comp. Stat. 5/535 (2005). Assessments are typically imposed on all self-insured employers and/or insurers to fund these fall-back benefits.

While the safety net provided by workers' compensation is generally sound, it is not immune to strains from cumulative insolvencies. For example, New York recently

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[12] U.S. Dep't of Labor, Table 1 (2005), *at* http://www.dol.gov/esa/regs/statutes/owcp/stwclaw/tables-pdf/table1.pdf.

authorized an emergency loan of up to $70 million to its Workers' Compensation Security Fund so that the fund could meet its obligations. 2005 N.Y. Sess. Law News, ch. 33 (McKinney). Even if the system as a whole remains solvent, when an employer fails to pay its contributions to the system, the cost of providing benefits to that employer's workers (whether by an insurer or a back-up fund) is shifted to the State or to other employers, thereby raising the overall cost of providing workers' compensation. *See* Meg Green, *Clean-up Operation: State Guaranty Funds are Handling the Messy Details from a Rash of Insolvent Property/Casualty Companies*, Best's Review 50 (Feb. 1, 2004).

2. Disability Benefits

Like workers' compensation, disability benefits replace the wages of an employee who cannot work due to injury or illness. Disability benefits differ from workers' compensation principally in that they cover disabling injury or illness that is unrelated to work. Employers may also elect to offer disability benefits for workplace injuries above the benefit levels set by workers' compensation laws.

Unlike workers' compensation, disability coverage is elective in most States. But five States require most employers to carry temporary disability insurance ("TDI") for their employees. Cal. Unemp. Ins. Code § 2601 *et seq.*; Haw. Rev. Stat. §§ 392-1 to 392-101; N.J. Stat. Ann. §§ 43:21-25 to 43:21-65; N.Y. Workers' Comp. Law §§ 200-242; R.I. Gen. Laws §§ 28-39-1 to 28-41-33. Railroads must also provide TDI under federal law. 45 U.S.C. §§ 351-369. Mandatory TDI programs are administered much like workers' compensation.

3. ERISA Benefits

The last major piece of the employee benefits puzzle is the regulation of employee benefit plans by ERISA, which

was enacted just a few years before § 507(a)(4) was added to the Bankruptcy Code. ERISA defines an "employee benefit plan" as either an "employee pension benefit plan" or an "employee welfare benefit plan." 29 U.S.C. § 1002(3). An "employee pension benefit plan" is one providing retirement income. *Id.* § 1002(2). An "employee welfare benefit plan" is one that provides other types of benefits, including provision of workers' compensation benefits through insurance. *Id.* § 1002(1); *see infra* at 38-39.

Although Congress recognized in ERISA that workers' compensation insurance is a type of employee benefit plan, Congress also sought to preserve the States' historical power to mandate and regulate workers' compensation. Congress therefore exempted employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws" from ERISA's operative provisions, as well as from its broad clause preempting state laws that "relate to any employee benefit plan." 29 U.S.C. §§ 1003(b)(3), 1144(a).

ERISA prescribes administrative safeguards for plans to which its operative provisions apply, but it generally does not require employers to provide any particular benefits. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91 (1983). There are exceptions; for example, ERISA mandates that group health plans cover a 48-hour hospital stay after childbirth. 29 U.S.C. §§ 1185-1185b. ERISA's broad preemption rule generally prevents States from imposing additional benefits requirements on employee benefit plans, *see Shaw*, 463 U.S. at 95-100 – except, of course, for state laws mandating workers' compensation or similar benefits, which are exempted from preemption precisely to preserve the authority of the States to compel employers to provide those benefits. 29 U.S.C. § 1144(a).

One of ERISA's central purposes is to secure the payment of pension benefits that an employer promises to employees. ERISA generally requires all plan assets to be held in a trust (unless the assets take the form of insurance, which is an alternative way of securing benefits). 29 U.S.C. § 1103. ERISA also imposes detailed participation, vesting, and accrual requirements for employees' entitlement to pension benefits, and minimum contribution requirements from employers to fund those benefits. *E.g.*, 29 U.S.C. §§ 1052-1054, 1081-1086, 1421-1426. Under these requirements, an employee is entitled to pension benefits "'solely on the basis of service performed for a participating employer, regardless [of] whether that employer ... has made or defaulted on his required contributions.'" *Cent. States, SE & SW Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 567 n.7 (1985) (quoting Dep't of Labor Advisory Opinion); *see also, e.g., Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 416-20 (1995). Thus, when a contributing employer defaults, a pension fund must still pay accrued benefits to the defaulter's employees. Many multiemployer funds have thousands of contributing employers to make up any shortfall and ensure payment of benefits.[13] And if a pension fund does become insolvent, the Pension Benefit Guaranty Corp. ("PBGC") exists as a fall-back fund guaranteeing payment of

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[13] For example, Howard contributed to the Central States, Southeast and Southwest Areas Fund ("Central States Fund"), which has a large claim against Howard potentially entitled to § 507(a)(4) priority. *See* Sched. E, Pet. & Stmt. of Fin. Affairs [Dkt. 1]. The Central States Fund has thousands of participating employers, and had assets in excess of $17.7 billion at the end of 2003. *See* http://www.centralstatesfunds.org/cs/OurCompany.asp; *see also Cent. States*, 472 U.S. at 561 n.1.

at least a portion of promised benefits. *See* 29 U.S.C. § 1301 *et seq.*[14]

SUMMARY OF ARGUMENT

Zurich's claim for amounts due from Howard is entitled to priority under § 507(a)(4) as a "claim[] for contributions to an employee benefit plan . . . arising from services rendered within 180 days of the filing of the [bankruptcy] petition."

Zurich's entitlement to the priority here is plain and unambiguous. Zurich's workers' compensation policies establish an "employee benefit plan" – *i.e.*, a scheme determined in advance for providing Howard's employees with health, disability, and death benefits, which are paradigmatic employee benefits. Zurich's "claim" is "for contributions," which simply means the payments Howard is obligated to make to the plan, *i.e.*, the amounts due under the policies. And the claim "arises from services rendered within 180 days" before bankruptcy, because it represents the amount due for coverage that Howard obtained for its workers who performed services during the 180-day period.

Notwithstanding this unambiguous statutory text, Howard insists that § 507(a)(4) applies only to "bargained-for wage substitutes," not to employee benefits that are mandated by law (such as most workers' compensation). Howard makes a halfhearted attempt to tease support for its position from the text of § 507(a)(4), but none of its textual arguments withstands scrutiny. That is not surprising, because the origin of the notion that § 507(a)(4) protects only "bargained-for wage substitutes" is not the statutory text, but inferences from the legislative history. Howard's argument

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[14] ERISA does not require such guarantees for employee welfare benefits. However, some multiemployer welfare plans provide for payment of benefits to employees even if their employer defaults on its contributions. *See, e.g., Eastern Enters. v. Apfel*, 524 U.S. 498, 510-11 (1998).

therefore boils down to a plea to replace the more inclusive phrase Congress enacted with a narrower test for eligibility that appears nowhere in the statute. As it has in the past, the Court should reject that invitation to rewrite the Bankruptcy Code based on the view that Congress might have meant something different from what it said. *E.g.*, *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 307 (2003) ("We think Congress meant what it said"); *Patterson v. Shumate*, 504 U.S. 753 (1992); *Union Bank v. Wolas*, 502 U.S. 151 (1991); *Toibb v. Radloff*, 501 U.S. 157 (1991); *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235 (1989).

Howard's position is that § 507(a)(4) should be limited to the particular circumstances identified in the legislative history. Specifically, Howard focuses on legislative materials suggesting that the catalyst for enactment of § 507(a)(4) was the desire to "overrule" *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), and *Joint Industry Board of the Electrical Industry v. United States*, 391 U.S. 224 (1968), which held that contributions to benefit plans under collective bargaining agreements were not entitled to the then-existing priority for wages in the predecessor to § 507(a)(3). But this Court has emphatically rejected exactly that type of argument many times before. Broad statutory language may not be construed narrowly merely because it encompasses situations in addition to those on which Congress focused at the time of enactment. *Union Bank*, 502 U.S. at 157-58; *Toibb*, 501 U.S. at 161-63. It would be particularly inappropriate to do so here, because the drafting history of § 507(a)(4) shows that Congress deliberately chose the phrase "employee benefit plan" to be as all-encompassing as possible.

Nor can Howard justify its restrictive reading of § 507(a)(4) by arguing that priorities should be construed narrowly to achieve equality among all creditors. Section

507 itself manifests the policy that some classes of unsecured creditors should be paid before others. Thus, the true principle is not that *all* creditors should be treated equally, but that creditors *of equal priority* should receive pro rata shares of the debtor's property. To achieve equality within each class, priorities must be interpreted using ordinary principles of statutory construction, not narrowly construed to exclude some creditors whom Congress included.

Howard's approach also leads to interstate nonuniformity, administrative difficulties, and absurd results – none of which follow from the statute's plain meaning. On Howard's reading, contributions for the same benefits (*e.g.*, temporary disability insurance) by a multistate employer like Howard receive priority in States that do not mandate that benefit (*e.g.*, Pennsylvania), but not in States that do (*e.g.*, New York). Howard's reading would also force bankruptcy courts to decide whether a particular employee benefit was a "wage substitute" in States like New Jersey, where workers' compensation is formally elective but might be practically mandated. And Howard's position would have the perverse consequence of denying priority precisely when a State or the federal government deems a benefit so important that employers must provide it.

ERISA – enacted four years before § 507(a)(4) – also confirms that the natural meaning of "employee benefit plan" encompasses legally mandated workers' compensation insurance. ERISA's general definition of "employee benefit plan" indisputably includes mandatory workers' compensation. Moreover, the drafting history of § 507(a)(4) shows that Congress directly borrowed the phrase from ERISA because its natural meaning is a broad one.

Finally, enforcing § 507(a)(4) as written directly advances the core purpose for which Congress created the priority in the first place – protecting the financial integrity of

employee benefit plans. To be sure, Howard's employees will likely receive their benefits whether or not Zurich can claim the priority in this particular chapter 11 proceeding. But that is also true of many benefits provided by other plans that all agree are entitled to the priority, such as the multiemployer pension plans represented by amicus National Coordinating Committee of Multiemployer Plans ("NCCMP"), which must continue to pay benefits to employees of a defaulting employer with or without this priority. The language of § 507(a)(4) makes clear that eligibility for the priority does not turn on whether the moneys flow through directly to the debtor's employees; the priority applies to contributions to a plan, not payments to employees. It thus provides a measure of systemic protection for employee benefit plans rather than protection for the benefits of particular employees. In addition, § 507(a)(4) advances the Code's broader purpose of promoting the rehabilitation of insolvent debtors, because it gives insurers an incentive to continue coverage – without which an employer may not legally operate in most jurisdictions – even when the employer is facing insolvency.

The Fourth Circuit thus correctly adhered to the most natural reading of § 507(a)(4)'s text, as well as the reading that makes the most sense as a matter of logic and policy. That decision should be affirmed.

ARGUMENT

I. Zurich's Claim Qualifies for Priority Under the Plain Language of § 507(a)(4).

The meaning of the Bankruptcy Code, like other statutes, should be derived from the words Congress enacted into law. When the Code's "language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (quotation

marks omitted); *accord NextWave*, 537 U.S. at 307; *Ron Pair*, 489 U.S. at 242.

Section 507 of the Code specifies certain "expenses and claims" that "have priority" for payment. A "claim" is simply a "right to payment" from the bankruptcy debtor; its mirror-image is a "debt," or the debtor's "liability on a claim." 11 U.S.C. § 101(5)(A), (12). Accordingly, in giving priority to certain "claims," § 507 lists categories of unsecured debts for which the bankruptcy debtor is liable but that it has not paid, *e.g.*, debts for "alimony," "wages," various kinds of "tax[es]," or "contributions to an employee benefit plan." *Id.* § 507. Section 507 establishes the order in which these priorities are to be satisfied from the estate's assets, which is then given effect in other Code sections.[15]

Section 507(a)(4) grants fourth priority to "allowed unsecured claims for contributions to an employee benefit plan . . . arising from services rendered within 180 days before the date of filing of the [bankruptcy] petition." 11 U.S.C. § 507(a)(4). It stands in contrast to the next higher or third priority conferred by § 507(a)(3) on "claims . . . for . . . wages . . . earned by an individual." *Id.* § 507(a)(3).

It is clear from the text of § 507(a)(4) that Zurich is entitled to priority for the amounts Howard owes under its workers' compensation policies. First, workers' compensation is an "employee benefit." As indicated by its constituent words and by ordinary usage, "employee benefit" denotes a benefit (other than wages) that employers must provide to employees (or their dependents) by virtue of their status as employees. In the absence of a statutory definition,

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[15] *See, e.g.*, 11 U.S.C. § 726(a) (in Chapter 7 liquidation, estate assets shall first be distributed in order of § 507 priorities); *id.* § 1129(a)(9) (in Chapter 11 case, plan shall not be approved unless priority classes are paid in full or consent to different treatment).

"employee" is presumed to have its accumulated meaning under the law of agency. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992). And "benefit" (another term undefined by the Code) has the ordinary meaning of "'something that guards, aids, or promotes well-being: advantage, good'; 'useful aid'; 'payment, gift [such as] financial help in time of sickness, old age, or unemployment'; or 'a cash payment or service provided for under an annuity, pension plan, or insurance policy.'" *Fischer v. United States*, 529 U.S. 667, 677 (2000) (quoting *Webster's Third New International Dictionary* 204 (1971)).

As its very name indicates, workers' compensation provides employees (workers) with benefits (compensation). Indeed, workers' compensation benefits are paradigmatic employee benefits. Benefits that an employer provides to its "workers with group life, health, and disability insurance through a master policy" are "employee benefit[s]" under § 507(a)(4). *In re Saco Local Dev. Corp.*, 711 F.2d 441, 448-49 (1st Cir. 1983). Exactly the same employee benefits are provided by workers' compensation, which pays a death benefit (life insurance) to the families of employees killed on the job; covers the medical costs (health insurance) for employees injured on the job; and provides income (disability insurance) for employees whose workplace injuries impair their earning ability. *See supra* at 7. And the nexus between workers' compensation and employment status is especially tight. Benefits are triggered by work-related injuries or occupational diseases, and thus are linked to the very conditions of employment.

It is equally clear that Howard's insurance policies with Zurich establish a "plan" for providing these benefits. In *Pegram v. Herdrich*, 530 U.S. 211 (2000), the Court observed that the "common understanding of the word 'plan'" is "a scheme decided upon in advance." *Id.* at 223

(citing *Webster's New International Dictionary* 1879 (2d ed. 1957)). Applying this ordinary meaning to an arrangement between an employer and an HMO, the Court explained:

> Here the scheme comprises a set of rules that define the rights of a beneficiary and provide for their enforcement. Rules governing collection of premiums, definition of benefits, submission of claims, and resolution of disagreements over entitlement to services are the sorts of provisions that constitute a plan. . . . [T]he agreement between an HMO and an employer who pays the premiums may, as here, provide elements of a plan by setting out rules under which beneficiaries will be entitled to care.

Id.; *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987) (plan is "a set of standard procedures to guide processing of claims and disbursement of benefits"); *cf. Saco*, 711 F.2d at 448 (discussing "insurance plan").

Although *Pegram* was decided under ERISA, its reading of "plan" reflects the ordinary meaning of the word, rather than anything specific to that statute. *See* 530 U.S. at 223. It thus applies with equal force here because the term "plan" is not defined in the Bankruptcy Code and must therefore be given its ordinary meaning. *See Rousey v. Jacoway*, 125 S. Ct. 1561, 1566 (2005). The policies Zurich issued to Howard establish an "employee benefit plan," in that they embody a "scheme decided upon in advance" with rules governing the premiums that Howard must contribute to the plan, and the amounts and preconditions of the employee benefits that Zurich must pay to Howard's workers.

The amounts Howard owes under the workers' compensation policies are also plainly "contributions." In the employee benefit context, "contribution" means "a sum

paid by an employer" (or an employee) to a benefit plan or fund, including a sum paid to obtain insurance. *Webster's Third New International Dictionary* 496 (1993 ed.) (definition 4c of "contribution" as meaning "a sum paid by an employer to an unemployment or group-insurance fund or for retirement benefits for employees; *also* : a sum paid by employees under such a plan"). Thus, a "claim for contributions" given priority under § 507(a)(4) is simply the right to payment of such sums: the amount due from the debtor in order to help fund the plan for the provision of benefits to employees. The amounts due from Howard to Zurich for workers' compensation benefits coverage are precisely that.

Finally, Zurich's claim "aris[es] from services rendered within 180 days before the date of the filing of the [bankruptcy] petition." The statutory text does not specify *whose* services are intended, and it can be read as referring either to the services of the debtor's employees (as Howard contends) or of the claimant. It is not necessary to resolve that question here, because under either reading Zurich's claim "aris[es] from services rendered within 180 days." The phrase "arising from" is a broad one, requiring only that there be some kind of causal relationship between the services and the claim. *See, e.g., Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-83 (2004). Judge King explained how Zurich's claim arises from the services rendered by Howard's employees during the requisite time: "It is only because workers were employed by Howard (and performing services to it) prior to the bankruptcy filing that Howard's obligation to provide insurance and pay the necessary premiums arises." Pet. App. 21a-22a. By the same token, the claim can be said to arise from Zurich's own services of providing coverage during the 180-day period. *See* J.A. 16a.

In sum, the statutory language is plain, and the Fourth Circuit correctly "enforce[d] it according to its terms" to grant Zurich a priority. *Lamie*, 540 U.S. at 534 (quotation marks omitted).

II. The Priority Created by Congress in § 507(a)(4) Is Not Limited to "Bargained-For Wage Substitutes."

Notwithstanding the statutory text, Howard contends that § 507(a)(4) does not apply here because Congress intended to grant a narrow priority only to "bargained-for . . . wage substitutes." Pet'rs Br. 34; *see also In re Birmingham-Nashville Express Inc.*, 224 F.3d 511 (6th Cir. 2000) (adopting "bargained-for wage substitute" restriction); *In re Southern Star Foods, Inc.*, 144 F.3d 712 (10th Cir. 1998) (same); *In re HLM Corp.*, 62 F.3d 224 (8th Cir. 1995) (same).[16]

Although Howard asserts that the plain meaning of § 507(a)(4) supports this restriction, its purported "textual" arguments have little if anything to do with the actual language of the statute. That is because the real origin of the "wage substitute" theory is not the language of § 507(a)(4), but the notion – which Howard purports to derive from the legislative history – that the provision was intended to do nothing more than "overrule" this Court's decisions in *Embassy Restaurant* and *Joint Industry Board*. *See Birmingham-Nashville*, 224 F.3d at 517 (deriving restriction

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[16] Howard's concept of a "bargained-for wage substitute" is quite unlike that in *Rousey*, in which the Court held that the exemption under 11 U.S.C. § 522(d)(11)(E) applies only if an asset "provide[s] income that substitutes for wages earned as salary or hourly compensation." 125 S. Ct. at 1569. The *Rousey* standard does not turn on whether a benefit is *bargained-for*, but on whether the stream of payments it provides replaces wage-earner income. The disability and death benefits provided by workers' compensation are substitutes for wages in the *Rousey* sense.

from legislative history); *Southern Star*, 144 F.3d at 715-16 (same); *HLM*, 62 F.3d at 225-26 (same).

The scope of § 507(a)(4) cannot be limited to "bargained-for wage substitutes." That limitation would be illogical, and the intent to impose it certainly may not be attributed to Congress in the absence of a textual basis that is utterly lacking here. Nor can the restriction be justified by resort to legislative history, both because doing so would be improper in the face of clear statutory text, *Union Bank*, 502 U.S. at 158; *Toibb*, 501 U.S. at 162, and because the legislative history does not support Howard in any event. In the end, Howard is forced to fall back on the contention that § 507(a)(4) should be "construed narrowly." But that plea cannot justify imposing an arbitrary limitation with no purchase in the language of the statute itself.

A. Nothing in the Text of the Code Supports the "Wage Substitute" Theory.

Howard's attempts to ground the "wage substitute" argument in the language of § 507(a)(4) are meritless.

"Employee benefit." Howard's brief offers no construction of the words "employee benefit" that would support excluding mandatory benefits, and the text simply will not support such a construction. Indeed, "the most significant feature" of § 507(a)(4) "that is relevant to this case is the absence of any language distinguishing between" bargained-for and mandatory employee benefits. *See Union Bank*, 502 U.S. at 155. The Court has recognized that legally mandated severance benefits are "employee benefits" under the identical language in ERISA. *Fort Halifax*, 482 U.S. at 3-4, 7; *see also Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 (1997) (referring to "assessments" imposed by government "to cover employee benefits"). As a textual matter, the fact that state or federal law requires employers to provide a particular benefit is irrelevant.

Because the statutory language "employee benefit" encompasses legally mandated as well as bargained-for benefits, interpreting it as a synonym for bargained-for benefits is "mystifying." *See Patterson*, 504 U.S. at 766 (Scalia, J., concurring).

Nor would it make any sense to exclude mandatory benefits from § 507(a)(4). Several States mandate that employers provide *disability* benefits – a form of employee benefit that Howard concedes is entitled to priority under § 507(a)(4). Pet'rs Br. 8, 12, 22, 37. ERISA itself mandates that health plans cover some employee benefits, such as minimum hospital stays after childbirth (*see supra* at 12), that no one has ever suggested should be excluded from § 507(a)(4). And it is inconceivable that if Congress passed a law requiring all employers to provide health insurance for their employees (or authorizing States to do so), the resulting mandatory health coverage would cease to be an employee benefit within the ordinary meaning of § 507(a)(4).

Howard also contends that workers' compensation cannot be an "employee benefit" within the meaning of § 507(a)(4) because its benefits flow principally to employers. That is incorrect. The compensation paid to injured workers is clearly an employee benefit, even assuming that workers' compensation laws and insurance also benefit employers by abolishing potential tort liability and spreading risk. "That one beneficiary of an assistance program can be identified does not foreclose the existence of others." *Fischer*, 529 U.S. at 677-78. Moreover, it can hardly be disputed that "the primary purpose of [workers' compensation laws] is to benefit the worker." *Griffin*, 663 N.W.2d at 865.[17]

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[17] *Accord, e.g., Eversman*, 614 N.W.2d at 864; *Keith v. Hopple Plastics*, 178 S.W.3d 463, 466 (Ky. 2005); *Sylvester v. Indus. Comm'n*, 756 N.E.2d 822, 827 (Ill. 2001); *Kroger Co. v. Keng*, 23 S.W.3d 347, 349

By the same token, employees derive advantages from workers' compensation *insurance* – even if employers do too. Insurance ensures that injured employees receive their workers' compensation benefits even if their employer becomes insolvent or otherwise defaults. States require employers to obtain workers' compensation insurance (or to qualify to self-insure) and penalize employers who fail to do so precisely because insurance is primarily for the benefit of employees. *See, e.g.*, N.J. Stat. Ann. § 34:15-83 ("Every contract of [workers' compensation] insurance . . . is made for the benefit of the several employees of the insured employer and their dependents"). No such legal coercion would be needed if the insurance were only for the benefit of the employer.[18]

Howard has thus failed to identify any plausible basis for excluding Zurich's claim from § 507(a)(4) on the ground that state-mandated workers' compensation is not an "employee benefit."[19]

(Tex. 2000); Arthur B. Honnold, *Theory of Workmen's Compensation*, 3 Cornell L.Q. 264 (1917-1918).

[18] Even if employees did not benefit from the insurance as such, the health, disability, and death benefits provided by workers' compensation itself would still be employee benefits. Howard's argument confuses *employee benefits* with the *plan* that provides them.

[19] Howard also asserts that there was a specific priority for workers' compensation from 1934 to 1938 and that the Court should infer therefrom that workers' compensation is not covered by § 507(a)(4) because it is not specifically mentioned now. Pet'rs Br. 19-20. That is incorrect on all fronts. Legislation in 1934 made claims for workers' compensation awards "provable" and allowed them "the priority provided for in clause (7)" of the priority statute, which at the time gave claims whatever priority they were entitled to under state law. Act of June 7, 1934, Pub. L. No. 73-296, 48 Stat. 923-24 (1934); *Missouri v. Ross*, 299 U.S. 72, 73 & n.1 (1936). In 1938, Congress excised the state-law priority on the ground that priorities should be governed by purely federal standards. H.R. Rep. No. 75-1409, at 9, 15, 89 (1937). Thus, neither the

"Contributions." Howard is equally unpersuasive in contending that the statutory term "contributions" only encompasses payments for "wage substitutes." Ignoring the obviously applicable dictionary definition, *supra* at 20-21, Howard latches on to two inapposite meanings of the word.[20]

First, based on the meaning of "contribution" in the context of charitable giving, *see Webster's Third* 496 (definition 3a), Howard suggests that a § 507(a)(4) "contribution" must be voluntary. But most meanings of "contribution" do not connote voluntariness. In fact, the original meaning of the word is "a payment imposed upon a body of persons" – the very opposite of a voluntary payment. *Id.* (definition 1). The concept of "mandatory contributions" – which would be an oxymoron if "contributions" were necessarily voluntary – appears repeatedly in this Court's cases. *E.g.*, *United States v. Lee*, 455 U.S. 252, 258 (1982) ("mandatory contributions" to social security); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2696 (2005) (it is "mandatory" for carriers to "contribute" to universal service fund).[21] Moreover, even when bargained for, employee benefits are rarely if ever

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priority nor its elimination was specific to workers' compensation. In any event, when Congress enacted a general priority for *all* employee benefit plan contributions in 1978, there was no need to single out workers' compensation for special mention.

[20] Howard inaccurately suggests that *Webster's Third*'s definitions of "contribute" and "contribution" changed after § 507(a)(4) was enacted. Pet'rs Br. 11-12. In fact, the definitions have not changed at all. *Compare Webster's Third New International Dictionary* 496 (1976 ed.) (defining "contribute" and "contribution"), *with id.* at 496 (1981 ed.) (identical definitions), *with id.* at 496 (1993 ed.) (identical definitions).

[21] Similarly, a federal advisory commission proposed funding retiree health benefits for coal miners through "'a *statutory obligation to contribute* to [certain employee benefit] plans'" – a proposal that was eventually enacted into law. *Eastern Enters.*, 524 U.S. at 512 (quoting advisory commission) (emphasis added).

voluntary in the sense of the definition Howard invokes relating to charities. *See Saco*, 711 F.2d at 449; *Sheet Metal Workers Local 19 v. Keystone Heating & Air Conditioning*, 934 F.2d 35, 37 (3d Cir. 1991) (describing "collective bargaining agreement that required the company to make contributions to employee benefit funds"). Such benefits are mandated by economic reality, even if not by law. If Congress's use of "contribution" limited § 507(a)(4) to philanthropy, it would cover almost nothing.

Second, Howard points to the definition of "contribute" as "to give or grant something in common with others," and suggests that "contributions" count under § 507(a)(4) only when there are multiple contributors to a joint fund. Pet'rs Br. 12 (quoting *Webster's Third*). That cannot possibly be correct because a bargained-for benefit plan may have only one contributor, just as a mandatory plan may have many. The meaning of "contribution" in the employee benefit context refers to *any* sum paid by an employer to a plan – whether or not it is to a joint fund. *See supra* at 20-21; *Mead Corp. v. Tilley*, 490 U.S. 714, 718-19 (1989) (describing "a single-employer defined benefit plan" that "was funded entirely by [the employer's] contributions"); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 607 (1993) (referring to "contributors to . . . single-member . . . plans"); *Saco*, 711 F.2d at 448-49. Congress did not intend to limit § 507(a)(4) to contributions to multiemployer plans, while denying priority to single-employer plans.

"Arising from services rendered within 180 days." The "services rendered" language of § 507(a)(4) likewise lends no support to Howard's position. Throughout its brief, Howard truncates the statutory language to omit the words "within 180 days," thereby suggesting that Congress intended the phrase "services rendered" to narrow the

substantive scope of the priority. *See, e.g.*, Pet'rs Br. i, 28-29. But the point of the statutory language is obviously to impose a temporal limit: only claims arising from services rendered *within 180 days before bankruptcy* qualify for the priority.

Beyond this misleading truncation, Howard offers no explanation why its reading of "services rendered" would exclude Zurich's claim. Even if the debtor's obligation to make contributions must arise from its employees' services during the 180-day period, that in no way requires that the contributions must be wages or "bargained-for wage substitutes." Howard suggests in passing that Zurich's claim arises not from the services of Howard's employees, but rather from "the employer's default in payment to the insurance company." *Id.* at 8. But a default precedes *every* claim for contributions that a debtor has failed to pay. Thus, on Howard's reading, *no* claim would ever be entitled to priority. "[A]rising from" must refer to the events that give rise to the right to payment in the first place, regardless of default. *See* 11 U.S.C. § 101(5)(A), (12) ("claim" is a "right to payment" based on a "debt").[22]

Statutory context. Finally, there is no merit to Howard's contention that the statutory "context" limits § 507(a)(4) to "wage substitutes." Howard focuses on the relationship between § 507(a)(4) and the priority for wages in § 507(a)(3). But the stark contrast between the language of these separate priorities makes clear that § 507(a)(4) is *not* intended as a priority for compensation earned by and paid to

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[22] As noted *supra*, at 21, it is not necessary to decide *whose* services this language references. Nonetheless, Howard's argument that reading "services rendered" to refer to the services of the claimant would "lead to illogical phraseology," Pet'rs Br. 29, is based on misreading a different statutory term – "contribution" – to refer to a contribution by the insurer, rather than the payment that the *debtor* is obligated to make to the plan.

employees, because it expressly confers the priority on claims for payments "to an employee benefit plan." *Compare* 11 U.S.C. § 507(a)(3) (giving third priority to "claims . . . for . . . wages . . . earned by an individual"), *with id.* § 507(a)(4) (giving fourth priority to "claims for contributions to an employee benefit plan").[23] Ignoring that express distinction between the scope of the two subsections, Howard argues that the priority for "contributions to an employee benefit plan" must implicitly be limited to "wage substitutes" merely because it is subject to the same dollar cap as the wage priority. *See* 11 U.S.C. § 507(a)(4)(B).

That is an insupportable leap. The common cap on the *amount* of the claims entitled to priority under § 507(a)(3) and § 507(a)(4) cannot dictate the *nature* of the claims entitled to priority under the plain language of those provisions. The shared cap simply reflects a compromise that Congress struck between competing types of priority claims when it inserted the new priority for employee benefit plan contributions into the existing hierarchy. Congress provided that wage claims shall be paid first, up to the amount of the cap, so that the new benefit priority would not impair the wage priority. *Cf. Embassy Rest.*, 359 U.S. at 33-34 (observing that if employee benefit plan contributions were granted the same priority as wages, it could reduce the employee's own recovery). Congress also extended the same cap to the priority for employee benefit plan contributions so that claims with *lower* (or no) priority would not be prejudiced by insertion of the new § 507(a)(4) priority above

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[23] NCCMP thus distorts the § 507(a)(4) priority by arguing that Zurich is improperly claiming priority as the subrogee of Howard's employees. *See* NCCMP Br. 15 n.12. That argument would work only if the priority belonged to the employees. But the plain language of § 507(a)(4) makes clear that the priority applies to contributions to a plan, not payments to employees. Hence, Zurich need not step into the shoes of the employees as their subrogee to qualify for the priority.

them. Nothing in this elegant compromise limits the *kinds* of contributions to employee benefit plans that receive priority under the clear language of § 507(a)(4).[24]

Equally meritless is Howard's contention that Zurich cannot claim priority under § 507(a)(4) because state workers' compensation funds are purportedly entitled only to the lower priority for excise taxes under § 507(a)(8)(E). This argument simply assumes that state insurance funds are not entitled to the § 507(a)(4) priority. In fact, to the extent that a state fund underwrites workers' compensation insurance policies, it would be entitled to the priority for "contributions to an employee benefit plan" for the same reasons Zurich is. Nothing about the fact that the insurance is underwritten by the State would relegate it to a lower priority, as Howard assumes. Indeed, the only case we are aware of that denied the § 507(a)(4) priority to a state-administered workers' compensation underwriter is *In re Southern Star Foods, Inc.*, 144 F.3d 712 (10th Cir. 1998) But that case did not turn on the fact that the fund was state-administered. Rather, it applied the same erroneous "wage substitute" theory that Howard urges here. *See id.* at 715-16. As that theory is wrong, *Southern Star*'s denial of the § 507(a)(4) priority to the state-administered fund was also in error.[25]

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[24] Similarly, the scope of the wage priority is not altered by the fact that it shares the common cap with the benefit priority. On Howard's logic, the shared cap should limit the § 507(a)(3) wage priority to "employee benefit plan substitutes," which would exclude the minimum wage and mandatory overtime because they cannot be bargained away for greater employee benefits. That is obviously absurd, and so is the mirror-image limitation Howard would impose on § 507(a)(4).

[25] Howard cites cases in which state funds have claimed the excise tax priority under § 507(a)(8)(E), but those cases do not support the negative inference that state insurers are not entitled to priority under § 507(a)(4) – a question that the excise tax cases do not address. Where estate assets are sufficient to cover all priority claims but not all nonpriority claims (as

B. The Legislative History Does Not Limit § 507(a)(4) to "Wage Substitutes."

Because Zurich is entitled to a priority under the plain text of § 507(a)(4), the "sole function of the courts . . . is to enforce it according to its terms." *Lamie*, 540 U.S. at 534 (quotation marks omitted). To overcome that text, Howard would have to show that it would be "absurd" for the § 507(a)(4) priority to encompass Zurich's claim, *id.*, or, at the very least, that doing so would be "demonstrably at odds with the intentions" of Congress, *Ron Pair*, 489 U.S. at 242 (quotation marks omitted). Under either standard, Howard's reliance on snippets of legislative history cannot meet the "exceptionally heavy" burden of showing that Congress did not mean what it said in § 507(a)(4). *See Union Bank*, 502 U.S. at 155-56. Not one word in the legislative history expresses an intent by anyone to exclude workers' compensation benefits from the scope of the priority. To the contrary, the legislative history shows that Congress chose the words "employee benefit plan" precisely because of their breadth, in order to sweep in all forms of employee benefits. *See infra* at 41-42.[26]

Lacking any affirmative evidence in the legislative history, Howard contends that its restrictive interpretation of § 507(a)(4) should be inferred from the fact that the provision was designed to overrule *Embassy Restaurant* and *Joint*

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frequently occurs), state funds have a very strong incentive to seek priority under § 507(a)(8)(E) in addition to or instead of § 507(a)(4), for two reasons: claims under § 507(a)(8)(E) are not subject to any dollar cap, and they reach back three years, instead of merely 180 days.

[26] Indeed, at least one union witness testifying in support of § 507(a)(4) specifically noted workers' compensation as a common form of benefit. *Bankruptcy Reform Act: Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 94th Cong., 268-69 (Apr. 17, 1975) (statement of Jeffrey Gibbs, AFL-CIO) ("*Hearings on S. 235 and S. 236*").

Industry Board, which concerned "fringe benefits" other than workers' compensation. Pet'rs Br. 8-9, 33-34; *see also, e.g., Birmingham-Nashville*, 224 F.3d at 517. That argument fails on its own terms. Congress did not truly "overrule" those cases – as it could have by, for example, redefining the word "wages" in § 507(a)(3) to include a specific list of "wage substitutes." To the contrary, Congress accepted the Court's holding that the wage priority in § 507(a)(3) does not extend to the benefit plan contributions at issue in those cases, and then created an *entirely new* priority for contributions to employee benefit plans in § 507(a)(4) that neither refers to wages nor requires that employees hold the claim for the priority to apply. The legislative history simply never suggests that Congress sought to limit the newly created priority to "bargained-for wage substitutes." Thus, while *Embassy Restaurants* and *Joint Board* may have "catalyzed the enactment of" § 507(a)(4), they cannot be said to "define the outer limits of the statute's coverage." *New York v. FERC*, 535 U.S. 1, 21 (2002).

Howard also points to portions of the legislative history indicating that Congress was principally concerned with "collective bargaining" and "labor contract negotiations." Pet'rs Br. 34. But this proves far too much. Howard concedes that § 507(a)(4) is not limited to union plans or those that result from collective bargaining. Pet'rs Br. 21; *see also Saco*, 711 F.2d at 448-49. Indeed, it could hardly do otherwise. The passages Howard quotes are simply additional examples of plans that Congress wished to include within the scope of the statute – not statements marking the outer boundaries of the statute's coverage.

In these critical respects, Howard's statutory construction argument is exactly like arguments this Court has consistently found wanting. The reality is that "statutory prohibitions often go beyond the principal evil [Congress

was concerned with] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (that "statute can be applied in situations not expressly anticipated by Congress" indicates "breadth" of language that Congress chose).

The Court has been particularly adamant in its refusal to narrow the operative scope of Bankruptcy Code provisions based on supposed congressional intent reflected in the legislative history. *E.g.*, *Patterson*, 504 U.S. at 762 (rejecting argument that "applicable nonbankruptcy law" in § 541 excluded federal nonbankruptcy law); *Union Bank*, 502 U.S. at 157-58 (rejecting argument that payments in "ordinary course of business" under § 547(c)(2) excluded ordinary-course payments on long-term debt); *Toibb*, 501 U.S. at 161-62 (rejecting argument that "person" in § 109(d) excluded individuals); *Ron Pair*, 489 U.S. at 242-49 (rejecting argument that "secured claim" in § 506(b) excluded claims secured by nonconsensual liens). As in *Patterson*, the legislative history here "reflect[s] at best congressional intent to *include* [bargained-for benefits] within the meaning of '[employee benefits].' By no means do[es it] provide a sufficient basis for concluding, in derogation of the statute's clear language, that Congress intended to *exclude* other [benefits] from the provision's scope." 504 U.S. at 762 (emphasis added).

Indeed, to the extent Congress enacted § 507(a)(4) to ensure that employers live up to all the obligations they assume by hiring employees, that concern requires payment of mandatory as well as bargained-for employee benefit plan contributions. Just as workers are promised legally mandated minimum wages and overtime in addition to any wages they

may bargain for, so they are promised mandatory contributions to employee benefit plans in addition to bargained-for contributions. And just as the legally mandated wage amounts receive a § 507(a)(3) priority, contributions to legally mandated employee benefit plans receive a § 507(a)(4) priority.

In any event, even when mandatory, workers' compensation coverage substitutes for wages just like any other employee benefit does. When employers cover the cost of this benefit, employees do not need to spend their wages to obtain insurance against the financial hardships caused by industrial accidents. As the Court observed in 1917, "just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer . . . under the new [workers' compensation] system, presumably will be reflected in the wage scale." *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 201-02 (1917). Substantial empirical evidence bears that prediction out: the cost to the employer of mandatory workers' compensation is reflected in lower wages.[27]

C. The "Wage Substitute" Theory Would Lead to Irrational Results with No Textual Basis.

Howard's "bargained-for wage substitute" theory also leads to irrational results and unnecessary problems of administration. On Howard's theory, contributions for exactly the same employee benefits receive priority in some

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[27] *See, e.g.*, Price V. Fishback & Shawn Everett Kantor, *Did Workers Pay for the Passage of Workers' Compensation Laws?*, 110 Q.J. Econ. 713 (1995); Jonathan Gruber & Alan B. Krueger, *The Incidence of Mandated Employer-Provided Insurance*, 5 Tax Policy & Econ. 111, 126-34, 139 (1991); W. Kip Viscusi & Michael J. Moore, *Workers' Compensation: Wage Effects, Benefit Inadequacies, and the Value of Health Losses*, 69 Rev. Econ. & Stat. 249 (1987).

States (*e.g.*, Texas, where workers' compensation is optional) but not in others (*e.g.*, Oklahoma, where it is mandatory). Even within a single State, the priority would apply to workers' compensation coverage for some employers who may elect it (*e.g.*, employers in Tennessee with five employees), but not for others for whom it is mandatory (*e.g.*, employers in Tennessee with six employees). *Supra* at 9-10. Similarly, temporary disability premiums paid by Howard would be entitled to priority for covered employees in Pennsylvania, where disability insurance is not mandated, but not for those across the border in New York and New Jersey, where it is. *Supra* at 11.

As the examples show, Howard's reading would mean that contributions for the very same benefits are entitled to priority only when the legislature thinks the benefits are *not* important enough to be mandatory. Under this theory, the cost of providing the few kinds of benefits mandated by Congress in ERISA, such as minimum hospital stays for childbirth, would also be excluded from the priority, even though those costs are plainly "contributions to an employee benefit plan." There is simply no reason to think Congress would have intended such perverse results.

The "wage substitute" theory would also embroil bankruptcy courts in difficult questions concerning whether a particular benefit is mandatory in a given jurisdiction. Courts would have to decide, for example, whether Howard's payments for workers' compensation coverage in New Jersey, where "[t]echnically coverage is elective, but practically compulsory," *supra* at 10, are entitled to priority. Other difficult questions would arise when one employee benefit plan covers employees in States where particular benefits (such as temporary disability benefits) are mandatory and also covers employees in other States where those benefits are optional. Courts would then be faced with

the task of ascertaining how much of an employer's unpaid contribution should be subject to a priority claim and how much should not. Nothing in § 507(a)(4) remotely suggests that Congress intended the priority for contributions to employee benefit plans to turn on such questions.

D. Petitioners Cannot Override § 507(a)(4)'s Language with an Arbitrary "Narrow Construction."

Lacking any other argument, Howard falls back on the general contention that bankruptcy priorities must be construed narrowly to preserve the Code's philosophy of equality among creditors. Pet'rs Br. 10-11, 14.

This argument is based on a faulty premise. The Code's philosophy is not equality among all creditors, regardless of their circumstances – if it were, then there would be no priorities at all. Rather, the very provision of the Code at issue here establishes a hierarchy under which some creditors are paid *before* other creditors. Thus, the operative principle is actually that creditors "*of equal priority* should receive pro rata shares of the debtor's property." *Begier v. IRS*, 496 U.S. 53, 58 (1990) (emphasis added); *see also SBA v. McClellan*, 364 U.S. 446, 452-53 (1960) ("policy of equality of distribution for *similar* creditors") (emphasis added); *Missouri v. Ross*, 299 U.S. 72, 74-75 (1936); *Shropshire, Woodliff & Co. v. Bush*, 204 U.S. 186, 189 (1907); 11 U.S.C. §§ 726(a)-(b), 1123(a)(4).

In light of this principle, it does not make sense to interpret the priority provision especially narrowly or especially broadly – it makes sense to give the priority the scope Congress intended based on the words Congress used. *Cf. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000) (explaining that a canon "is a tool of construction, not an extratextual supplement"); *United States v. Noland*, 517 U.S. 535, 540-43 (1996) (refusing to

permit use of equitable subordination to disturb policy judgments Congress made in the priority statute). Indeed, arbitrarily narrowing the reach of § 507(a)(4) to deny priority to one kind of employee benefit plan while giving priority to others would defeat the true principle of equality among creditors "of equal priority."

For this reason, the Court has long applied traditional interpretive tools, particularly ordinary language analysis, to the priority provisions of the Code. *See, e.g.*, *Shropshire*, 204 U.S. at 189 (examining "the plain words of" the wage priority provision and "find[ing] no warrant for supplying . . . a restriction" rendering assignees of wages ineligible for the priority); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936) (construing priority statute and stating that "we seek the legislative intent," and "give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation"); *Lewis v. United States*, 92 U.S. 618, 623 (1875) (interpreting priority provisions and stating that "[n]either statute contains any qualification, and we can interpolate none. Our duty is to execute the law as we find it"); *see also Patterson*, 504 U.S. at 763-64 (plain language of the Code overrides general bankruptcy policy). It is true that in a handful of cases – including, ironically, the very cases that Congress superseded when it enacted § 507(a)(4) – this Court has stated generally that the priority statute must be interpreted in light of the bankruptcy law's "theme of equality of distribution." *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952), *cited in Embassy Rest.*, 359 U.S. at 31. But even those occasional statements do not suggest that creditors given priority by Congress should be reduced to "equality" with creditors to whom Congress did not grant priority. *See Nathanson*, 344 U.S. at 29 (refusing to distinguish between two different groups of "wage claimants"); *Joint Indus. Bd.*, 391 U.S. at 228 (noting that in spite of "the general policy of

the Bankruptcy Act to distribute assets of the estate equally to creditors," there is a statutory priority afforded to wages).

In the end, Howard offers nothing more than an arbitrary limitation on § 507(a)(4) based on inconsistent and unsupported policy arguments untethered from the provision's text. These arguments flout the rule that Congress knows how to make exceptions to general terms in the Bankruptcy Code when it intends to do so. *See, e.g., Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Congress defined 'debt' broadly and took care to except particular debts from discharge where policy considerations so warranted"); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985) (Congress knows how to limit application of a bankruptcy provision when it wants to).

In this case, as in all other cases interpreting the Bankruptcy Code, this Court's role is to give effect to Congress's intent as evinced by the words in the statute. As demonstrated above, those words entitle Zurich to priority payment of Howard's unpaid workers' compensation debts for the period specified in § 507(a)(4).

III. ERISA Confirms That the Ordinary Meaning of § 507(a)(4)'s Language Includes Payments for Workers' Compensation Insurance.

ERISA – enacted only four years before § 507(a)(4) – confirms that the ordinary meaning of "employee benefit plan" encompasses insurance to provide workers' compensation benefits. ERISA identifies "employee welfare benefit plans" as one of two main types of "employee benefit plans" (the other being "employee pension benefit plans"). 29 U.S.C. § 1002(3). An "employee welfare benefit plan" is, in turn, defined as:

> any plan, fund, or program . . . established or maintained by an employer or by an employee

> organization, or by both, to the extent [it] was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeships or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any [non-pension] benefit described in section 186(c) of this title [§ 302 of the Taft-Hartley Labor Management Relations Act].

Id. § 1002(1).

Workers' compensation insurance is encompassed within both alternative (A) and alternative (B) of this definition. Workers' compensation insurance provides a "plan . . . or program . . . established [and] maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance . . . , medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." *Id.* § 1002(1)(A). Workers' compensation insurance also provides non-pension "benefit[s] described in section 186(c) of this title," *id.* § 1002(1)(B), which expressly encompasses benefits "for injuries or illness resulting from occupational activity or insurance to provide . . . the foregoing" – *i.e.*, workers' compensation insurance. *Id.* § 186(c)(5)(A).[28]

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[28] ERISA's incorporation of § 186(c) carefully specifies that it encompasses all "benefits *described* in section 186(c)" – not just such benefits when they are provided by union trusts under § 186(c). *See Mass. v. Morash*, 490 U.S. 107, 114 n.9 (1989) (Congress was concerned

Confirming that workers' compensation insurance comes within the concept of an employee benefit plan, ERISA's operative provisions and preemption clause expressly exempt "any employee benefit plan if . . . such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws." *Id.* § 1003(a), (b)(3); *see also id.* § 1144(a) (creating the same exception to preemption of state laws that "relate to any employee benefit plan"). This express exemption drives home that the ordinary meaning of "employee benefit plan" encompasses workers' compensation insurance mandated by state law, and that Congress knows how to carve mandatory workers' compensation insurance out of the coverage of a federal law relating to employee benefit plans when it intends to do so.[29] No such express exemption appears in § 507(a)(4) of the Bankruptcy Code – because none is intended.

Howard misses the point when it argues that the Court should not adopt a technical definition of "employee benefit plan" from a different statute with a different purpose when construing the same language in § 507(a)(4). Contrary to Howard's assumption, the meaning of "employee benefit plan" in ERISA is not derived from a technical definition tailored to a purpose peculiar to that statute, but reflects the ordinary and natural meaning of the phrase. *See, e.g.*, *Pegram*, 530 U.S at 222-23; *Darden*, 503 U.S. at 323. ERISA first defines "employee benefit plan" in a general way that reflects its ordinary meaning and includes workers'

"with assuring that all benefits covered by section 186(c) were also covered by section 1002(1)") (quotation marks omitted).

[29] *See also Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 131 (1992) (referring to "ERISA-exempt workers' compensation plans"); *Combined Mgmt., Inc. v. Superintendent of Bureau of Ins.*, 22 F.3d 1, 3-6 (1st Cir. 1994); *Employee Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1040-42 (9th Cir. 1994); *cf.* 28 U.S.C. § 1445(c) (forbidding removal of state workers' compensation cases to federal court).

compensation insurance. Only thereafter does ERISA narrow the concept in order to demarcate the subset of "employee benefit plans" – expressly excluding state-mandated workers' compensation plans – that are covered by ERISA's operative provisions and preemption clause. ERISA draws that distinction between the two kinds of employee benefit plans to achieve a purpose specific to ERISA: distinguishing between the employee benefit plans that are governed exclusively by federal law, and those like workers' compensation that States may regulate in order to mandate benefits. Thus, it is the *exclusion* of workers' compensation plans that reflects a narrowing of the ordinary meaning of "employee benefit plan" tailored to ERISA's specific purpose of demarcating federal from state jurisdiction. *That* purpose is indeed irrelevant to § 507(a)(4), which by its terms applies to all employee benefit plans, whether regulated by federal or state law. Yet Howard asks the Court to read the resulting exclusion of workers' compensation into the Bankruptcy Code provision.[30]

The drafting history of § 507(a)(4) also confirms that "employee benefit plan" has the same ordinary meaning in that provision as in the general definition in ERISA. The original draft of § 507(a)(4) gave priority to "pension, insurance, or similar employee benefit plans." *See* S. 235,

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[30] NCCMP's reliance on the Davis-Bacon Act (NCCMP Br. 28-29) is misplaced for essentially the same reason: Davis-Bacon further demonstrates that mandatory benefits are included in the ordinary meaning of employee or fringe benefits unless expressly excluded. Its formula for calculating the prevailing wage includes "fringe benefits" – "but only where the contractor . . . is not required by other federal [or] state . . . law to provide . . . those benefits." 40 U.S.C. § 3141(2)(B). By expressly excluding "required" or mandatory benefits, the Davis-Bacon Act indicates that such benefits are normally *included* in the concept of "fringe benefits" absent such exclusion – as in § 507(a)(4).

94th Cong. § 4-405(a)(4) (1975). That original language already encompassed workers' compensation insurance, but labor representatives urged Congress to adopt the even broader phrase "employee benefit plan" from ERISA – which had recently been enacted – to guarantee "federal bankruptcy law protection now and in the future of *all employee benefit plans*." *Hearings on S. 235 and 236*, *supra* note 26, at 259 (statement of Max Zimny, AFL-CIO) (emphasis added); *see also id.* (testifying that priority should extend to full range of benefits included within Taft-Hartley Act § 302(c), 29 U.S.C. § 186(c) – which, as explained *supra* at 39, includes workers' compensation insurance). Congress then amended the proposed legislation, replacing its earlier formulation with the even broader term "employee benefit plans." *See Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 95th Cong. 936 (Dec. 1, 1977) (statement of Max Zimny, AFL-CIO) (stating that under amended bill "[t]he protected status would extend to all employee benefit plans, the same broad, inclusive language contained in [ERISA]"). There can be little doubt, then, that the language means the same thing in both ERISA and the Bankruptcy Code, and includes workers' compensation insurance.

The 2005 amendments to other Code sections also confirm that in the absence of limiting language, the phrase "employee benefit plan" is intended to have the ordinary meaning captured by ERISA's general definition. For example, amended § 541 uses the term "employee benefit plan," but expressly *narrows* it in a way that excludes workers' compensation plans. The section as amended excludes from the "property of the estate" amounts withheld by an employer from employees' wages, or received by an employer from employees, "as contributions . . . to . . . an employee benefit plan *that is subject to* title I of [ERISA]."

11 U.S.C. § 541(b)(7)(A)(i)(I), (b)(7)(B)(i)(I) (as amended 2005) (emphasis added). While workers' compensation plans fall within the ERISA definition of "employee benefit plan," they are expressly excluded from the scope of title I's coverage, and Congress incorporated this exclusion in amended § 541. This demonstrates that Congress knows how to incorporate the exclusion of workers' compensation from ERISA's operative provisions into § 507(a)(4) if it wants to do so. Section 507(a)(4), of course, has no such textual limit. *See also id.* § 724(f)(2) (as amended 2005) (cross-referencing § 507(a)(4) without limiting scope of "employee benefit plan"). Where Congress has stated a limitation in one section but not another, the limitation may not be read into the section where Congress omitted it. *E.g.*, *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

In contrast, no inference can be drawn from cross-references in other amended Code sections to an "administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan." 11 U.S.C. § 704(a)(11) (as amended 2005); *see id.* §§ 521(a)(7), 1106(a)(1) (as amended 2005). Those cross-references to ERISA's definition of "administrator" are necessary because "administrator" – unlike "employee benefit plan" – has a multi-tiered technical meaning under ERISA.[31] Because ERISA's general definition of "employee benefit plan" reflects its ordinary meaning, no cross-reference is needed unless Congress intends a *narrower*

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[31] *See* 29 U.S.C. § 1002(16)(A) ("The term 'administrator' means – (i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor [as defined at length in § 1002(16)(B)]; or (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe").

definition of that term, as in amended § 541's exclusions from property of the estate.[32]

IV. Applying the Priority According to Its Terms to Cover Zurich's Claim Effectuates the Purposes of the Statute.

Applying the language of § 507(a)(4) according to its terms also effectuates a number of statutory purposes.

A. The Priority Protects the Long-Term Financial Health of the Employee Benefits System.

Giving priority to the debtor's obligations to make contributions to employee benefit plans – including payments due for workers' compensation coverage – protects the health of the employee benefits system. As a class, employees are certainly the *ultimate* beneficiaries of that protection for employee benefit plans. But the amounts entitled to priority under § 507(a)(4) do not, by and large, pass directly through to the debtor's own employees. Rather, by requiring bankrupt employers to pay their fair share for funding employee benefits and thereby strengthening the financial integrity of our employee benefits system, § 507(a)(4) indirectly benefits employees in the aggregate and over time.

This legislative purpose is directly advanced by giving priority to amounts due for workers' compensation insurance. If bankrupt employers do not pay the amounts they owe for insuring the payment of workers' compensation benefits to their employees, the shortfall will ultimately be reflected in

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[32] Howard suggests (Pet'rs Br. 17) that Congress's failure in 2005 to clarify the scope of "employee benefit plan" under § 507(a)(4) somehow endorsed the narrow reading of the section that several courts had then adopted. But other courts had construed the section to include workers' compensation insurance. *E.g.*, *Employers' Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993). Thus, Congress's failure to clarify hardly endorsed Howard's side of this split.

higher premiums for other employers. In extreme cases, cumulative shortfalls could undermine the financial stability of the insurer itself, creating uncertainty whether injured employees will receive the benefits to which they are entitled. When that occurs, injured workers must turn to state back-up funds for payment of the benefits they have been promised – but those state funds can be depleted by massive claims. *See* Green, *supra*, at 53 (describing "cash crunch" on state workers' compensation insurance guaranty funds caused by insolvent insurers). Giving a priority to amounts due for workers' compensation insurance protects the financial health of the system that States (and Congress in the LHWCA) created to guarantee this most important employee benefit.

It is, of course, correct that as to injuries suffered while the insurance remains in effect the insurer will pay benefits – for years or even decades in some cases – notwithstanding the employer's default. The very reason States require workers' compensation insurance is to secure the payment of benefits in this way. But nothing in § 507(a)(4) limits the priority to claims for contributions that will pass through to the debtor's own employees.

Indeed, it is particularly disingenuous for amicus NCCMP to argue otherwise, because multiemployer pension plans are exactly analogous to workers' compensation insurance in this respect. As this Court has recognized, "[a] multiemployer plan has features of an insurance scheme in which employers spread the risk that their employees will meet the plan's vesting requirements and obtain an entitlement to benefits." *Concrete Pipe & Prods.*, 508 U.S. at 638-39. Numerous employers pay contributions into a multiemployer plan's trust, and the plan is obligated to pay promised benefits to employees *even if their employer defaults* on its contributions; the plan makes up for the

shortfall by increasing the contributions of the other employers so that all vested benefits are paid. *See supra* at 13.[33] The PBGC also insures the payment of minimum benefits by all pension plans, including single-employer plans. *See supra* at 13-14. Just as in the workers' compensation context, multiemployer plans provide multiple safety nets to assure the payment of benefits to employees, regardless of whether the § 507(a)(4) priority applies.[34]

At bottom, then, Howard's policy argument for denying the priority for workers' compensation insurance while granting it to multiemployer pension trusts rests on mischaracterizations of both kinds of employee benefit plans. Howard misleadingly suggests that without the priority for the multiemployer pension plans, Howard's employees will not receive the pensions they were promised, when in fact the entire purpose of the multiemployer trust is to secure the pension benefits notwithstanding default by an employer. Howard also misleadingly argues that the only purpose of workers' compensation insurance is to manage the employers' risk, when in fact the insurance has precisely the same function of securing the payment of benefits for employees as a pension trust has. Indeed, ERISA recognizes this parity of function, in that it requires (with minor exceptions not relevant here) that all employee benefit plan

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[33] Some multiemployer welfare benefit plans also guarantee benefits to employees even if their employer becomes insolvent and cannot pay its contributions to the plan. *See supra* note 14.

[34] For example, the Central States Fund, one of the plans covering Howard's employees and claiming priority in this bankruptcy case, has thousands of contributing employers and billions of dollars in assets. *See supra* note 13. For Central States, just as for a workers' compensation insurer, the priority serves to protect the long-range financial integrity of the employee benefit system by requiring the bankrupt employer to pay its fair share of contributions, instead of shifting the cost to other contributing employers or to the public at large.

assets be held in a trust, *unless* the plan's assets consist of insurance. 29 U.S.C. § 1103(a), (b)(1)-(2).

Thus, Zurich plays exactly the same role in the employee benefits system that the multiemployer plans do. As all agree that the goal of § 507(a)(4) is furthered by giving priority to contributions to multiemployer plans, so too is it advanced by giving the very same priority to contributions for insurance to secure workers' compensation benefits.

B. The Priority Aids the Rehabilitation of Debtors by Inducing Insurers to Continue Coverage Needed to Do Business.

The priority also advances bankruptcy's purposes of "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999); *see also, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources").

To that end, the Code contains a number of provisions that encourage crucial third parties to continue doing business with a company that is facing serious financial difficulties. For example, § 507 itself gives very high priority to payment of the "actual, necessary costs and expenses of preserving the estate," thus recognizing the importance of encouraging creditors to provide the goods and services that a debtor requires for successful rehabilitation. 11 U.S.C. § 507(a)(1), (2); *see also* H.R. Rep. No. 95-595, at 186-87 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6147; 4 *Collier on Bankruptcy* ¶ 507.02[1][b] (2005). Indeed, post-petition claims for contributions to workers' compensation plans receive priority under this provision, because

continuing workers' compensation insurance for the debtor-in-possession is essential to preserving the bankruptcy estate's assets. *See, e.g., In re City Roofing Co. of Muskogee*, 208 B.R. 503, 505-06 (Bankr. E.D. Okla. 1997); U.S. Trustee Chapter 11 Guidelines, Part IV, *available at* http://www.bankruptcybar.org/ust/ust_guidelines.htm (requiring debtor to provide proof of workers' compensation insurance).

The Code also provides incentives for third parties to continue doing business with a struggling company prior to bankruptcy. For instance, the Code generally permits the trustee to avoid "preferences" (*i.e.*, recover payments by the debtor in the period right before bankruptcy), but Congress also specifically provided that the debtor's payments in exchange for "new value," and those made "in the ordinary course of business," are not avoidable. 11 U.S.C. § 547(b), (c)(1)-(2). The purpose of these exceptions "is to encourage creditors to continue doing business with troubled debtors who may then be able to avoid bankruptcy altogether." *In re Jones Truck Lines, Inc.*, 130 F.3d 323, 326 (8th Cir. 1997) (holding that contributions to employee benefit plans qualify for preference exemption based on new value supplied by employee services); *see also* 11 U.S.C. § 546(c)(1) (as amended 2005) (giving right to seller of goods to demand return of goods sold to debtor within 45 before bankruptcy filing).

Section 507(a)(4) serves the same function. In the unstable period when bankruptcy looms as a possibility and a financially insecure employer stops making its payments for workers' compensation coverage, a private insurer may well decide to cancel the insurance if there is no mechanism for obtaining payment after bankruptcy. Similarly, a union that maintains a benefit plan may call a strike or take other disruptive measures. And disgruntled employees who see their benefits disappearing – including employees of "self-

insured" businesses – are more likely to walk off the job. The priority provides an incentive against taking those actions by giving some assurance of ultimate payment. It thus encourages those with claims for contributions to give an employer breathing room – a chance to try to get back on its feet or at least to enter bankruptcy as a going concern.

This incentive is especially important in the case of employee benefit plans involving workers' compensation, because state laws generally render it unlawful for companies to operate without workers' compensation coverage.[35] Further, an employer that loses its private workers' compensation insurance on non-payment grounds generally cannot afford other coverage alternatives.

For employers, workers' compensation insurance is among their most critical assets. Giving priority to claims like Zurich's thus furthers the Code's most basic purpose by minimizing the likelihood that a troubled employer will be forced to liquidate, with the attendant loss of jobs and assets.

* * *

Workers' compensation is one of the oldest employee benefits, and still the only one that employers must provide in the majority of States, precisely because the health, disability, and death benefits it provides are critical to workers and their families, especially in industrial sectors. By giving a priority for contributions to an employee benefit plan, Congress manifested the very same interest in securing the financial health of the employee benefit system that motivated the States and Congress in their design of workers'

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[35] Some States authorize state regulators to force employers immediately to cease operations in the absence of workers' compensation coverage. *See, e.g.*, 820 Ill. Comp. Stat. 305/4(d); Tenn. Code Ann. § 50-6-412(g). Other States impose steep civil or criminal penalties on employers without coverage. *See, e.g.*, N.Y. Workers' Comp. Law § 52.

compensation systems. Petitioners would invert those policy concerns by denying priority for contributions to employee benefit plans precisely when the States, or Congress itself, deems the benefits so important as to make them mandatory. Nothing in § 507(a)(4) sanctions that counterintuitive result.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

MARGARET M. ANDERSON
HUGH S. BALSAM
LORD, BISSELL BROOK LLP
111 South Wacker Drive
Chicago, IL 60606
(312) 443-0402

KAREN LEE TURNER
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1515 Market Street, Ninth Floor
Philadelphia, PA 19102
(215) 851-8431

RICHARD W. HARDY
ZURICH AMERICAN INSURANCE COMPANY
3910 Keswick Road
Baltimore, MD 21211
(410) 338-9190

DONALD B. VERRILLI, Jr.
Counsel of Record
WILLIAM M. HOHENGARTEN
ELAINE J. GOLDENBERG
CAROLINE LEWIS WOLVERTON
ELIZABETH G. PORTER
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

BARBARA S. STEINER
DANIEL R. MURRAY
WILLIAM L. SCOGLAND
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Counsel for Respondent

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